No. 16,319

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID ALAN PARR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

LYNN J. GILLARD,
United States Attorney,
DONALD B. CONSTINE,
Assistant United States Attorney,
JOHN KAPLAN,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

FILED
JUL - 1 1959
PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdiction	1
Statement of the case	1
Statement of facts	2
Questions involved	5
Statute involved	5
Argument	6
I. The Appeal Board had basis in fact for denying a claim for conscientious objector, a classification of 1-O	6
II. The Federal Bureau of Investigation reports were properly denied the appellant where he was furnished with a fair resumé thereof	14
III. There is no error in the record before the Appeal Board	15
Conclusion	16
Appendix	

Table of Authorities Cited

Cases	Pages
Affeldt v. United States, 218 F. 2d 112	15
Bateman v. United States, 217 F. 2d 946	15
Blalock v. United States (4th Cir.) 247 F. 2d 615	15
Borisuk v. United States (3rd Cir.) 206 F. 2d 338	10
Campbell v. United States (4th Cir.) 221 F. 2d 454	7
Dickinson v. United States, 346 U.S. 389	6, 7

Pages

Kaline v. United States (9th Cir.) 235 F. 2d 54 15

Kent v. United States (9th Cir.) 207 F. 2d 234 9

Reese v. United States (9th Cir.) 225 F. 2d 766 14

Roberson v. United States (10th Cir.) 208 F. 2d 166 9

Rogers v. United States (9th Cir.) 263 F. 2d 683 14, 15

Selby v. United States (9th Cir.) 250 F. 2d 666 10

Shepherd v. United States (9th Cir.) 217 F. 2d 942, 220 F. 2d 885 7

Tomlinson v. United States (9th Cir.) 216 F. 2d 12, cert. den. 348 U.S. 970 6, 8, 9

White v. United States (9th Cir.) 215 F. 2d 782, cert. den. 348 U.S. 970 6, 8, 15

Wiggins v. United States (5th Cir.) 261 F. 2d 113 14

Witmer v. United States, 348 U.S. 375 6, 7, 8, 10

Statutes

18 United States Code, Section 3231 1

Universal Military Training and Service Act, Section 12(a), 50 U.S.C. App. 462(a) 1

Rules

Federal Rules of Criminal Procedure, Rule 37(a)(1) and (2) 1

No. 16,319

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID ALAN PARR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked by appellant under Title 18 United States Code, Section 3231 and Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on May 1, 1958 for violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a), in that he knowingly refused to submit himself to induction (Tr. 3-4). He pleaded not guilty, waived jury trial (Tr. 7-8), and was tried by the Honorable Michael J. Roche

on October 6, 7 and 8, 1958. Appellant thereafter was adjudged guilty (Tr. 13) and on October 8, 1958 was sentenced to a term of one year (Tr. 14). Prior to the adjudication of guilty, the trial court granted appellee's motion to quash service of a subpoena for the reports of the Federal Bureau of Investigation together with a report of the Hearing Officer of the Department of Justice (Tr. 9) and denied the appellant's motion for judgment of acquittal (Tr. 13). Appeal was made to this court from the judgment of conviction (Tr. 16).

STATEMENT OF FACTS.

Appellant first registered with Selective Service on May 7, 1951 and gave his date of birth as April 17, 1933.[1]

Appellant's Classification Questionnaire was filed with his Local Board on November 13, 1951. On page 3 of the questionnaire, appellant stated that he was a minister of religion regularly serving with the Jehovah's Witnesses Sect. He further stated that he was not a student preparing for the ministry. On page 4 of the questionnaire, appellant stated he had

[1]The following Statement of Facts is based on appellant's Selective Service file which was appellee's Exhibit No. 1 in evidence in the court below. Inasmuch as all pages of the Exhibit are contained in chronological order and according to date, reference will not be made to any identification numbers contained in the file. Wherever possible, the description and date of the particular document mentioned will be set forth for the purpose of identification in this brief.

been a Pioneer Minister since November of 1948, and since 1951 a member of the Bethel Family and Headquarters Staff of the Watchtower Society. Appellant on page 7 of the questionnaire stated he was conscientiously opposed to participation in war of any form.

On February 25, 1952, appellant was classified 4-D by the Local Board. On October 8, 1953, the Local Board received a letter from the defendant notifying it of the defendant's change of address and stating "I am now working with the Sacramento, California Central Unit of Jehovah's Witnesses." On March 29, 1954, the Local Board received information from appellant indicating that he had left his employment with the Bethel Family on September 21, 1953. A questionnaire received by the Local Board on April 14, 1954, contained the information that appellant was earning a living by accepting any jobs available and performing seasonal farm labor work. He further stated that he was conducting public preaching for about ten hours a month. On July 12, 1954, the Local Board classified appellant 1-A.

The Selective Service file of appellant contains a letter directed to the Board dated July 24, 1954 in which appellant appealed his 1-A classification and stated that he expected to be able to go back as a full-time minister at some future date. As stated, the classification of 1-A was appealed and appellant's case was referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objection claim.

On January 15, 1957, T. R. Smith, Chief, Conscientious Objector Section, Department of Justice, stated that the Department concurred in the determination of the Hearing Officer that the registrant was insincere in his conscientious objection to participation in combatant and non-combatant service and recommended to the Appeal Board that the appeal be not sustained. According to the Department of Justice's letter of January 15, 1957, the registrant, when he appeared before the Hearing Officer, stated he found no objection to the resumé of the reports of the Federal Bureau of Investigation other than the reference to him as a "playboy." The Department's letter noted, as set forth on pages 5 and 6 of the resumé, that appellant was requested to leave the Bethel Home because of his "playboy" activities. Appellant also advised the Hearing Officer, according to the Department's letter, that he would not accept a classification of 1-O (conscientious objector classification) because ". . . it would mean working for the government . . ."

Considering the entire Selective Service file of the registrant, the Department of Justice concluded that there was a substantial question as to the registrant's integrity, veracity and sincerity. On February 28, 1957, the Appeal Board classified appellant 1-A. On March 19, 1957, appellant was ordered to report for induction at the Induction Station, New York City on April 1, 1957. The Selective Service file of appellant, however, contains an Order for Transferred Man to Report for Induction dated April 18, 1957, indicating that at appellant's request, he was ordered

to report on April 25, 1957 at Sacramento, California, for induction. Appellant reported to the Induction Station as ordered, and on April 25, 1957 refused induction into the armed forces and thereafter was indicted for such failure to submit to induction.

It was stipulated at the trial that although ordered to report for induction, appellant refused (Tr. 19). It was further stipulated that a certified photostatic copy of the Selective Service file of appellant be marked and introduced as Government's Exhibit No. 1 in evidence in place of the original file and without calling the Draft Board Clerk to identify the file. (Tr. 18). Although appellant argued that he did not understand the nature of the induction ceremony, witnesses for the government as well as appellant himself on cross-examination indicated that appellant understood the induction ceremony and the consequences for failing to submit to induction (Tr. 25-43).

QUESTIONS INVOLVED.

1. Was there a basis in fact for appellant's classification of 1-A by the Appeal Board?

2. Was the defendant entitled to supoena the Federal Bureau of Investigation reports upon which the resumé used by the Department of Justice was based?

STATUTE INVOLVED.

The statute involved is set forth in the Appendix.

ARGUMENT.

I. THE APPEAL BOARD HAD BASIS IN FACT FOR DENYING APPELLANT EXEMPTION AS A CONSCIENTIOUS OBJECTOR, A CLASSIFICATION OF 1-O.

Appellant complains that the denials of a conscientious objector status, a classification of 1-O, by the Appeal Board and by the Department of Justice, in its recommendation to the Appeal Board, were without basis in fact and were arbitrary, capricious and contrary to law.

There has been in the past much litigation as to what constitutes a claim for classification as a conscientious objector, and what circumstances reflected in a registrant's file justify a Selective Service board in denying such a claim. In other words, what evidence or basis in fact would permit a board to deny a claim of conscientious objection?

The courts have drawn a distinction, since the case of *Dickinson v. United States,* 346 U. S. 389 was decided, as to the susceptibility of proof between a claim for ministerial status and a claim of conscientious objection. While the question of whether a registrant is a minister may be a factual one susceptible of exact proof by evidence, the best evidence of conscientious objection is not the registrant's assertions or those of his associates, but his sincerity, good faith, credibility and demeanor.

Witmer v. United States, 348 U. S. 375;

White v. United States, (9th Cir.) 215 F. 2d 782, Cert. den., 348 U. S. 970;

Tomlinson v. United States, (9th Cir.) 216 F. 2d 12, Cert. den., 348 U. S. 970;

Shepherd v. United States, (9th Cir.) 217 F. 2d 942, 220 F. 2d 885;
Campbell v. United States, (4th Cir.) 221 F. 2d 454.

The Supreme Court in *Witmer v. United States,* supra, confronted with the issue of what constituted a basis in fact for denial of a conscientious objector claim, held that any fact which casts doubt on the sincerity of the registrant is relevant in such cases, and is "affirmative evidence" that the registrant has not painted a complete and accurate picture. The court therefore held that the ultimate question is the sincerity of the registrant.

The court stated at pages 381 and 382 the following:

> "Here the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant. It is 'affirmative evidence . . . that a registrant has not painted a complete or accurate picture . . .' *Dickinson v. United States,* supra, p. 396."

The court further decided that a registrant claiming successive deferments on different grounds and making inconsistent statements concerning his claim of conscientious objection creates considerable doubt

as to the sincerity of his claim and provides a basis in fact for the denial thereof.

This court, in September 1954, prior to the Supreme Court decision of *Witmer v. United States,* supra, had occasion to decide the two cases of *White v. United States,* (9th Cir.) 215 F. 2d 782, cert. den., 348 U. S. 970, and *Tomlinson v. United States,* (9th Cir.) 216 F. 2d 12, cert. den., 348 U. S. 970, which clarified and set forth what standards may be considered in denying a claim of conscientious objection. In *White v. United States,* supra, this court pointed out that, in the determination of a registrant's belief and his sincerity therein, the best evidence on the question may well be his credibility and demeanor in a personal appearance before the local boards of the Selective Service System. In holding that the Appeal Board may take into consideration the fact that the Local Board had made a classification following its opportunity to observe the registrant's demeanor during his personal appearance, this court stated at pages 784 and 785:

> "The question before the local board had to do not with what religious organization or sect the appellant adhered to, nor what the teachings of that sect or organization was, but what was the sincere belief of this particular registrant and what was the extent of his conscientious opposition to military service. In other words, the local board initially, and the appeal board subsequently, were called upon to evaluate a mental attitude and belief. It is plain that when such matters are to be determined and passed upon, the atti-

> tude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as to the extent and quality of his beliefs. The local board, before whom the registrant appeared, had an opportunity surpassing that available to us or to the appeal board itself to determine and judge as to these matters."

Tomlinson v. United States, supra, holds that an Appeal Board may rely on the recommendation of the Department of Justice concerning a registrant's sincerity as a primary basis in fact for denying the claim of conscientious objection. This court stated at page 17:

> "In this instance it is plain that the appeal board's conclusion was based primarily upon the report of the hearing officer. Such a report may furnish the basis in fact which supports the board's action. *Kent v. United States,* 9 Cir. 207 F. 2d 234, 237; *Roberson v. United States,* 10 Cir. 208 F. 2d 166, 169. Its conclusions may also have been based in part upon that portion of the registrant's file which was transmitted with the appeal."

In addition, the court pointed out that objection to any governmental service is not an objection which the act recognizes and reflects directly upon the registrant's sincerity. The court stated at page 18:

> "The appeal board may well have been of the view that this registrant is primarily an objector who will have nothing to do with the affairs 'of this world.' True he is conscientiously opposed

> to killing; but his real objection to noncombatant service would appear to be its interfering with his carrying 'the message' and doing what he chose to call 'ministerial work.' We think that in drawing the line where it did, it cannot be said that the appeal board acted without basis in fact."

Thus, the Supreme Court, as well as this court, has held that the best evidence upon the question as to what a registrant claiming conscientious objection may believe or feel, is not his assertion or those of his associates, but his credibility and demeanor in personal appearances before the fact finders, the Local Board, and the Department of Justice Hearing Officer. Furthermore, an Appeal Board may rely for a basis in fact in denying a conscientious objector claim upon the report of the Hearing Officer forwarded through the recommendation of the Department of Justice, as well as the entire file of the registrant transmitted on appeal.

The most recent case from this district directly involving this issue is *Selby v. United States* (9th Cir.) 250 F. 2d 666, where the court quoted at length from *Witmer v. United Staes* and affirming again the rule of the above cases. See also *Borisuk v. United States* (3rd Cir.) 206 F. 2d 338.

In this case there are numerous factors, any one of which could supply a basis in fact for the denial of the Conscientious Objector classification. Since in these cases the sincerity of the applicant is the essen-

tial point, his demeanor before the Hearing Officer and the conclusion of the Hearing Officer who saw him at length, are most relevant. The Hearing Officer concluded that the appellant was not sincere and it would seem that this court should be most reluctant to overturn such a finding.

Another basis in fact for the denial of this claim is the credibility, as well as the sincerity, of the appellant. If, as the Local Board, the Hearing Officer, and the Appeal Board believed, the appellant had not answered his questionnaire frankly by failing to state on page 7 of his questionnaire that another person aided him in the preparation of his statement, the credibility of the appellant would be seriously impaired. In view of his subsequent statement in his answer to the "Recommendation of the Department of Justice to the Appeal Board," dated February 11, 1957, "I assure you all of the answers are my own thoughts, in my own choice of words," it would seem that the Board was more than justified in concluding that not only was the credibility of the appellant doubtful, but that he had, to be blunt, lied to the Board, and that he had received great amounts of help.

A comparison of the "Statement of David A. Parr in Support of Claim as Minister of Religion" attached to his questionnaire, dated November 10, 1951, with the handwritten and printed "Special Form for Conscientious Objectors," dated April 2, 1954, reveals that while the former is well written and flawlessly typed, the latter spells witnesses with two "t's" twice,

spells guidance "guidence," and spells sincerely "sincerley." Furthermore, although Jehovah's Witnesses is always spelled with an apostrophe throughout his typed material, the possessive form is used incorrectly approximately half of the time in the written material. Again, just 3 pages after the end of the "Special Form for Conscientious Objectors," on another form in answer to the question of how many hours appellant worked, appellant wrote "They varies from 6 to 12." On the page after this the appellant again spells witness with two "t's."

Yet another basis in fact which might have caused the Board to doubt the appellant's veracity, was his failure to live up to Instruction 5 on his original Selective Service System Classification Questionnaire. This Instruction states that "After this questionnaire has been returned, report to your local board at once any change of address, any change in place of employment or occupation, or *any other new fact which may affect your classification.*" (Emphasis supplied.) Certainly, the appellant must have known that the fact he was no longer fully occupied with the Bethel Home and its religious work might have influenced his Draft Board. Instead appellant merely filed a Change of Address Notice stating "I am now working with the Sacramento, California Circulation Unit of Jehovah's Witnesses." The implication here was that the appellant, though no longer at the Home, was performing the same type of work in Sacramento. In fact, of course, the appellant had been dismissed from the Home for being a "playboy" and was no longer

engaged anything like full time in ministerial activities. It should be noted here that appellant's Change of Address was mailed after the day he would have graduated from the Bethel School so that his Draft Board would have no notice of any kind that the appellant had not graduated and proceeded on to full time ministerial activities.

The last basis in fact for denying appellant's Conscientious Objector Classification is that the sincerity of the appellant is reflected upon adversely when, after his statements that "Here my entire time and life are devoted to the ministry, no time being spent in any secular work. During the week (five and one-half days) my duties are exclusively at the headquarters, my evenings and week-ends are devoted to door-to-door preaching and congregational duties, as well as Bible research and study," he was dimissed for being "spiritually sick" and a "playboy".

As the resumé of the Federal Bureau of Investigation reports, a Federal Bureau of Investigation informant further told the Federal Bureau of Investigation that on many occasions he had verbally strongly reprimanded the registrant with the hope that the registrant would correct himself. The informant further stated that the registrant failed to right himself and that under his direct orders, the registrant was requested to leave the staff of the Bethel family of Brooklyn . . . He also pointed out that since the registrant had failed to devote the necessary amount of time in his ministerial work, he was removed from the Pioneer list.

Appellant alludes in his brief to the argument that a 4-D, or Ministerial, classification was the only proper one here. Appellant cites the case of *Wiggins v. United States* (5th Cir.) 261 F. 2d 113 as supporting this proposition. First of all, the *Wiggins* case is not and never has been the law in this Circuit. See *Reese v. United States* (9th Cir.) 225 F. 2d 766. Furthermore, in the *Wiggins* case, the court was concerned with the deferment of a man who was a leader in the Jehovah's Witnesses, in charge of a whole area (page 118) even though he, like defendant, was engaged "full time" in secular employment. Furthermore, the Hearing Officer stated that "no one has appeared before him who impressed him with his uprightness, his fine character, and with his genuine sincerity and truthfulness" (page 117) more than Wiggins. Compare this with the case of the appellant who was asked to leave a ministry school because he was a "playboy" and "spiritually sick." Moreover, as the foregoing makes clear, there is ample reason for the Board here to doubt the appellant's sincerity. In *Wiggins,* the Draft Board, as the court pointed out numerous times, built no record of any kind and had no reason to doubt any of the defendant's statements.

II. THE FEDERAL BUREAU OF INVESTIGATION REPORTS WERE PROPERLY DENIED THE APPELLANT WHERE HE WAS FURNISHED WITH A FAIR RESUME THEREOF.

Appellant recognizes that this argument is foreclosed by *Rogers v. United States* (9th Cir.) 263 F.

2d 683. In addition to the *Rogers* case, the following cases hold directly against the appellant's view:

Blalock v. United States (4th Cir.) 247 F. 2d 615;

Kaline v. United States (9th Cir.) 235 F. 2d 54;

White v. United States (9th Cir.) 215 F. 2d 782.

III. THERE IS NO ERROR IN THE RECORD BEFORE THE APPEAL BOARD.

Although appellant cites cases in which the Department of Justice affirmatively misled the Appeal Board on questions of law, (see *Affeldt v. United States* 218 F. 2d 112; *Bateman v. United States* 217 F. 2d 946) the sole ground here is that the Department of Justice did not include something in its letter which was included in the fair resumé of the Federal Bureau of Investigation report. In view of the fact that this resumé was also available to the Appeal Board, appellant is forced to rely on the theory that perhaps the Appeal Board did not read the resumé. We submit that this argument borders upon the frivolous. The fact that the Appeal Board members are unpaid volunteers in no way supports inference that they did not consider all material before them. As appellant's counsel states, he "has no hesitancy in going outside the record and stating that he is informed and believes . . ." We believe that the above shows the insubstantiality of appellant's position.

CONCLUSION.

For the above reasons, the United States submits that no error has been shown in the conviction of appellant. He has received a fair trial and was properly convicted. A clear, convincing and substantial basis in fact existed for the classification of 1-A of appellant by the Appeal Board.

The judgment should be affirmed.

Dated, San Francisco, California,
June 14, 1959.

LYNN J. GILLARD,
United States Attorney,
DONALD B. CONSTINE,
Assistant United States Attorney,
JOHN KAPLAN,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

STATUTE

Section 6(j), Universal Military Training and Service Act, 50 U.S.C. App. 456(j) provides:

Conscientious objectors. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any

such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12

of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.